



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R01-OAR-2017-0138; FRL-9973-19-Region 1]

#### Air Plan Approval; New Hampshire; Rules for Open Burning and Incinerators

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of New Hampshire on August 9, 2011 and July 23, 2013. These SIP revisions establish rules for open burning and establish emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to Federal incinerator standards. We are also approving revisions to the definitions of “Incinerator” and “Wood Waste Burner,” submitted by the State on July 23, 2013 and October 26, 2016, respectively. This action is being taken in accordance with the Clean Air Act (CAA).

**DATES:** This rule is effective on **[Insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R01-OAR-2017-0138. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available at [www.regulations.gov](http://www.regulations.gov) or at the U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact

listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** Alison C. Simcox, Environmental Scientist, Air Quality Planning Unit, Air Programs Branch (Mail Code OEP05-02), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109-3912; (617) 918-1684; simcox.alison@epa.gov.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

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## **I. Background and Purpose**

On January 10, 2003, New Hampshire Department of Environmental Services (NH DES) submitted a SIP revision for Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution). On August 9, 2011, NH DES submitted an updated version of this regulation. Because the 2011 submittal superseded the previous submission, the State withdrew the 2003 submittal on May 5, 2014. The withdrawal letter is included in the docket for this action.

On July 23, 2013, NH DES submitted Env-A 1900 (Incinerators and Wood Waste Burners) and Env-A 101.104 (definition of “Incinerator”) to EPA for approval. Env-A 1900 is not currently part of the federally-approved New Hampshire SIP. The definition of the term “Incinerator” is currently part of the New Hampshire SIP, but is codified at Env-A 101.59<sup>1</sup> and does not include a reference to “wood-waste burners.” The submitted definition of “Incinerator” adds “wood-waste burners” to the definition and is codified at Env-A 101.104. The current SIP-approved version of the definition of “Incinerator” (Env-A 101.59) will be replaced by the new definition of that term (Env-A 101.104) as a result of this approval.

A definition of “Wood Waste Burner” is currently part of the New Hampshire SIP, but is codified as Env-A 101.95 and explicitly excludes incinerators. On October 26, 2016, NH DES submitted a revision of the definition of “Wood Waste Burner” (Env-A 101.219) to EPA for approval. This revised definition does not exclude incinerators. The current SIP-approved version of the definition of “Wood Waste Burner” (Env-A 101.95) will be replaced by the new definition of that term (Env-A 101.219) as a result of this approval.

The version of Env-A 1900 (Incinerators and Wood Waste Burners) submitted by the State to EPA included an affirmative defense provision for malfunction, which is defined as a sudden and unavoidable breakdown of process or control equipment. On April 13, 2016, NH DES sent a letter to EPA withdrawing the affirmative defense provision in Env-A 1900 (i.e., 1902.02). In addition, an earlier SIP submission of Env-A 1900 had included an exception to the 20-percent visible emissions limit that would have allowed these emissions to be exceeded for one period of 6 continuous minutes in any 60-minute period during startup, shutdown, or malfunction.

However, NH DES removed this exception from the July 23, 2013 submittal.

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<sup>1</sup> This appears to be an error because there are two different terms numbered 101.59 in Env-A 101, and the term “incinerator” is listed after term number 48 and before term number 50.

These SIP revisions establish rules for open burning and establish emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to Federal incinerator standards. New Hampshire also submitted revisions to the definitions of “Incinerator” and “Wood Waste Burner” on July 23, 2013 and October 26, 2016, respectively.

On September 6, 2017, EPA published a Notice of Proposed Rulemaking (82 FR 42054) and Direct Final Rulemaking (DFRN) (82 FR 42037) proposing to approve and approving, respectively, the revisions submitted by New Hampshire on August 9, 2011, July 23, 2013, and October 26, 2016.

In the DFRN, EPA stated that if an adverse comment were to be submitted to EPA by October 6, 2017, the action would be withdrawn and not take effect, and a final rule would be issued based on the NPR. EPA received a comment that is not relevant to this SIP action, and one adverse comment that is relevant, before the close of the comment period. Therefore, EPA withdrew the DFRN on November 6, 2017 (82 FR 51349).

This action is a final rule based on the NPR. A detailed discussion of New Hampshire’s August 9, 2011; July 23, 2013; and October 26, 2016, SIP revisions, and EPA’s rationale for approving these were provided in the DFRN and will not be restated here, except to the extent relevant to our response to the public comments we received.

## **II. Response to Comments**

EPA received public comments from anonymous commenters on our September 6, 2017 NPR. All of the comments are contained in the docket for this final action. One commenter submitted a comment that is not relevant to this SIP action and, therefore, requires no response. One commenter submitted two comments that are adverse and are discussed below.

*Comment 1:* An anonymous commenter noted that the proposed revisions to New Hampshire's Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution) removes the reference to National Ambient Air Quality Standards (NAAQS) nonattainment areas for particulate matter (PM) pollution that appears in the current SIP-approved version of Env-A 1000. The commenter stated that "EPA should not be allowed to reduce emission standards just because a corporation or company incinerator wants to burn more wood. Wood is a particularly dirty fuel source that causes significant particulate matter pollution both 2.5 microns and 10 microns."

*Response 1:* The SIP-approved Env-A 1000 (provision 1001.02) allowed for certain types of open burning if: 1) not prohibited by local ordinance or officials having jurisdiction, such as state forest fire wardens, and 2) where the particular area has not been designated nonattainment in relation to the NAAQS for PM. Under Env-A 1000, such burning was allowed in NAAQS nonattainment areas for PM (when not prohibited by local ordinance or officials having jurisdiction) if written authorization had been obtained by the NH DES. In the revised version of Env-A 1000, the State has removed the restriction on these activities in nonattainment areas for particulates. EPA believes that the version of Env-A 1000 we are approving is consistent with CAA requirements for SIP revisions, notwithstanding the absence of references to nonattainment areas for NAAQS as a limiting condition on certain types of burning. Because there have never been any designated nonattainment areas for PM in New Hampshire, the current provision is not in fact imposing any restrictions on emissions. Thus, the emissions reductions attributable to the revised version of Env-A 1000 we are approving is functionally the same as the prior version. Moreover, we note that the current ambient levels of PM within the State are below the currently applicable PM NAAQS. In the event that ambient PM in New Hampshire were to exceed the

applicable NAAQS, we would expect the State to add additional emissions controls to address the appropriate sources to bring the area back into attainment.

*Comment 2:* The same anonymous commenter asserted that the “EPA also can't remove nuisance provisions as they can cover enforcement of NAAQS pollutants that cause nuisances to neighboring communities and disadvantages communities. Sometimes only nuisance provisions are the only enforcement mechanism available to the little people that can't afford big lawyers or consent decrees with big companies.”

*Response 2:* New Hampshire's revision to Env-A 1000 removes two references to “nuisance” in the current SIP, which was approved in 1994. EPA believes that the State's revised version of the regulation is approvable under the CAA because the term “nuisance” in Env-A 1000, as defined in state law, is a broad concept that could be applied to prohibit impacts that bear no reasonable connection to the NAAQS and related air-quality goals of the CAA. The fact that something may cause a nuisance does not necessarily equate to a condition that would interfere with attainment or maintenance of the NAAQS. The wording of the prior version of the SIP provision was not sufficiently related to attainment and maintenance of the PM NAAQS to warrant inclusion in the SIP. See, for example, analogous instances in which EPA has removed from SIPs certain regulations that prohibit odors (61 FR 47058, September 6, 1996), or that contain a general prohibition against air pollution (63 FR 65557, November 27, 1998).

### **III. Final Action**

EPA is approving and incorporating two regulations into the New Hampshire SIP. The two regulations include revised Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution) submitted by the State of New Hampshire on August 9, 2011, effective on May 1, 2011; and Env-A 1900 (Incinerators and Wood Waste Burners) submitted by the State on July

23, 2013, effective April 23, 2013, except for the withdrawn affirmative defense provision. The revised version of Env-A 1000 that we are approving into the SIP will replace the existing SIP-approved version of Env-A 1000.

In addition, EPA is approving a revised definition of “Incinerator” (Env-A 101.104), submitted by the State on July 23, 2013, effective April 23, 2013, which replaces the definition of “Incinerator” currently in the New Hampshire SIP (numbered Env-A 101.59). We are also approving a revised definition of “Wood Waste Burner” (Env-A 101.219), submitted by the State on October 26, 2016, effective January 14, 2005, which replaces the definition of “Wood Waste Burner” currently in the New Hampshire SIP (numbered Env-A 101.95). Thus, the SIP at Env-A 101.59 and at Env-A 101.95 will read “[reserved].”

New Hampshire organizes Env-A 101 (Definitions) alphabetically, and also assigns a codification number, in sequential order, to each defined term. Because the State’s SIP submissions did not include the entirety of Env-A 101, and the State has added other definitions to Env-A 101 over time (not all of which are SIP-approved), our approval of the two definitions in this action will result in the numbered codification assigned to the defined terms being out of numerical sequence in the SIP. However, the two defined terms will still be in alphabetical order.

#### **IV. Incorporation by Reference**

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the New Hampshire Code of Administrative Rules described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov>, and/or at the EPA Region 1 Office

(please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.<sup>2</sup>

## V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

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<sup>2</sup> 62 FR 27968 (May 22, 1997).



- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the

United States. Section 804, however, exempts from section 801 the following types of rules:

Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of nonagency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 20, 2017.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements.

(See section 307(b)(2)).

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: February 6, 2018.

Alexandra Dapolito Dunn,  
Regional Administrator,  
EPA New England.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 et seq.

**Subpart EE—New Hampshire**

2. In § 52.1520 paragraph (c), amend the table by:

a. Adding four entries for “Env-A 100” after the entry “Env-A 100; Organizational Rules: Definitions”;

b. Revising the entry “Env-A 1000”; and

c. Adding in numerical order an entry “Env-A 1900”.

The revision and additions read as follows:

**§ 52.1520 Identification of plan.**

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(c) \* \* \*

**EPA-APPROVED NEW HAMPSHIRE REGULATIONS**

State citation	Title/subject	State effective date	EPA approval date <sup>1</sup>	Explanations
**	*	*	*	**
Env-A 100	Definition of “Incinerator”	04/29/2003	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	Remove Part Env-A 101.59, definition of “Incinerator” and replace with “[reserved].”

Env-A 100	Definition of “Wood Waste Burner”	04/29/2003	<b><u>[Insert date of publication in the Federal Register],</u></b> <b><u>[Insert Federal Register citation]</u></b>	Remove Part Env–A 101.95, definition of “Wood Waste Burner” and replace with “[reserved].”
Env-A 100	Definition of “Incinerator”	04/23/2013	<b><u>[Insert date of publication in the Federal Register],</u></b> <b><u>[Insert Federal Register citation]</u></b>	Approve Part Env–A 101.104, definition of “Incinerator.”
Env-A 100	Definition of “Wood Waste Burner”	01/14/2005	<b><u>[Insert date of publication in the Federal Register],</u></b> <b><u>[Insert Federal Register citation]</u></b>	Approve Part Env–A 101.219, definition of “Wood Waste Burner.”
**	*	*	*	**
Env-A 1000	Control of Open Burning	05/01/2011	<b><u>[Insert date of publication in the Federal Register],</u></b> <b><u>[Insert Federal Register citation]</u></b>	Approve Part Env–A 1000 “Prevention, Abatement and Control of Open Source Air Pollution.”
**	*	*	*	**
Env-A 1900	Emission Standards and Operating  Practices for Incinerators	04/23/2013	<b><u>[Insert date of publication in the Federal Register],</u></b> <b><u>[Insert Federal Register citation]</u></b>	Approve Part Env–A 1900 “Incinerators and Wood Waste Burners.”
**	*	*	*	**

<sup>1</sup> In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

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[FR Doc. 2018-03251 Filed: 2/15/2018 8:45 am; Publication Date: 2/16/2018]